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Idaho Conservation League

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Cheryl Probert, Forest Supervisor
Nez Perce-Clearwater National Forests
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June 2, 2015

RE: Supplemental Idaho Conservation League (ICL) scoping comments on the Silver Lode 9 (NF), Julie Shaft Lode (NF), Sweet 50 (NF), Chuckers Lode (RR), Pasadena Frank Peck Lode (RR), Newsome (RR), Gold Zone (RR), Orogrande Project 2013 (RR), Heritage 2 Placer (RR), Baldy Creek Placer (RR), Heritage Gulch Placer (RR), Lost Bench Placer (RR), Pioneer Placer (RR), Lower and East Sand Creek Placer (SR), Steamboat Placer (SR), Rex Placer (SR), Pioneer Gulch/Summit Placer (SR), Max 2 Placer (SR), Shadow Creek (SR), Old Shoe Lode (SR), New Red Lead Adit (NF), Chetwood Lode (L), Gold Zone Drilling (RR), Pioneer Placer (RR), Jule Mine Exploration Drilling (NF), Max #2 Placer (SR) Exploration Projects and any other pending proposed categorically excluded Mineral Exploration projects¹

Dear Cheryl,

Thank you for considering these supplemental scoping comments submitted for each of the following 26 mineral exploration projects the Forest Service is reviewing for approval in the Nez Perce-Clearwater National Forest: Silver Lode 9 (NF), Julie Shaft Lode (NF), Sweet 50 (NF), Chuckers Lode (RR), Pasadena Frank Peck Lode (RR), Newsome (RR), Gold Zone (RR), Orogrande Project 2013 (RR), Heritage 2 Placer (RR), Baldy Creek Placer (RR), Heritage Gulch Placer (RR), Lost Bench Placer (RR), Pioneer Placer (RR), Lower and East Sand Creek Placer (SR), Steamboat Placer (SR), Rex Placer (SR), Pioneer Gulch/Summit Placer (SR), Max 2 Placer (SR), Shadow Creek (SR), Old Shoe Lode (SR), New Red Lead Adit (NF), Chetwood Lode (L), Gold Zone Drilling (RR), Pioneer Placer (RR), Jule Mine Exploration Drilling (NF), Max #2 Placer (SR) Exploration Projects. These comments (including the associated scoping

¹ Abbreviations in parentheses indicate ranger districts in which projects are located.

NF = North Fork Ranger District, RR = Red River Ranger District, L = Lochsa Ranger District and SR = Salmon River Ranger District.

notices attached) should be considered a supplement to each of the comments ICL submitted on these 26 specific projects between 2010-2015.

Since 1973, the Idaho Conservation League has been Idaho's leading voice for conservation. The Idaho Conservation League works to protect clean water, wilderness and quality of life through public education, outreach, advocacy, and policy development. As Idaho's largest state-based conservation organization, we represent over 25,000 supporters, many of whom have a deep personal interest in protecting human health and the environment from the effects of mining.

As we noted in our previous comments, we feel strongly that an EA is required for each project based on the degree of, or uncertainty surrounding, extraordinary circumstances present for each project, as well as for other reasons set forth in our comments. We also raised concerns about whether each Project would comply with the Forest Plan, the Endangered Species Act, and other laws and regulations.

We write to supplement our previous comments to raise concerns about cumulative impacts and the use of the categorical exclusion set forth at 36 C.F.R. § 220.6(e)(8) ("Category 8"). Category 8 exempts certain short-term mineral investigations and incidental support activities, among other activities, from undergoing full review under NEPA. We believe that it is improper for you to approve any of these 26 projects using Category 8 and must at a minimum prepare an EA for each project.

First, the agency cannot utilize Category 8 in these cases.. As the Ninth Circuit has held, an agency's decision to establish a category of actions that are excluded from full NEPA review can only be made with a full understanding of the significance of the impacts resulting from application of the category. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007) ("The Forest Service must perform this impacts analysis prior to promulgation of the CE."). Of particular importance, "the Forest Service must perform a programmatic cumulative impacts analysis for the . . . CE." *Id.* at 1029. In *Bosworth*, the Ninth Circuit invalidated the Forest Service's reliance on a categorical exclusion that was promulgated without a complete analysis of cumulative and other impacts. The Court then enjoined projects approved pursuant to that categorical exclusion. *Id.* at 1026-1030. The same legal rule applies to the agency's failure to comply with the procedural and substantive requirements of the ESA.

The Ninth Circuit held that the Forest Service violated these requirements in adopting the 2003 Hazardous Fuels CE in *Bosworth*, because the agency failed to assess the cumulative impacts from future projects to be approved under the CE. As the court explained:

Relying solely on a project level analysis is inadequate because it fails to consider impacts from past, present, or reasonably foreseeable Fuels CE projects which may be located in close proximity, in the same watershed or endangered species habitat.

Bosworth, 510 F.3d at 1027. Moreover, the Ninth Circuit emphasized that cumulative impacts analysis "is of critical importance in a situation such as here, where the categorical exclusion is nationwide in scope and has the potential to impact a large number of acres." *Id.*, at 1028.

The same is true in the case of Category 8. The Forest Service never performed a direct, indirect or cumulative impacts analysis (or any of the required ESA consultation and analysis) on Category 8 -- routine, short-term mining investigations and their incidental support activities -- and the related provisions in Chapter 30 of the Forest Service Handbook regarding extraordinary circumstances.² As a result, impacts at the local, forest, state, and regional level from the mineral investigation activities authorized or covered by Chapter 30 and Category 8 were never evaluated. As in *Bosworth*, the Forest Service never reviewed the significance factors required by NEPA in assessing whether its action -- adopting a categorical exclusion and the extraordinary circumstances provision -- may have significant impacts. Accordingly, because adoption of Category 8 and Chapter 30 violated NEPA and the ESA, the Forest cannot rely upon on those provisions for the approval of the proposed exploration projects.

Second, even if Category 8 was properly adopted, we question whether you can use Category 8 to approve any of these 26 mineral exploration projects, because the 26 projects are concentrated in three ranger districts and have potentially significant cumulative impacts on the human environment. Project activities include constructing and using roads, trenches, drill pads, and sumps, as well as using and storing fuel, accessing and occupying the project site, storing equipment, withdrawing water, processing bulk and drill samples, discharging process wastewater, and other activities causing adverse impacts to public resources. These and other project activities may have cumulatively significant impacts to roadless areas, wildlife and wildlife habitat, ESA-listed fish species and other aquatic life, surface and ground water quality and quantity, wetlands, riparian areas, cultural resources, recreation, and other Forest resources. Accordingly, Category 8 cannot be used to approve these projects.

² The original version of Forest Service Handbook 1909.15, Section 31.2, including Category 8, was contained in a Federal Register Notice. 57 Fed. Reg. 43180, 43209-10 (September 18, 1992). This Handbook section has been revised and reissued many times since then. In 2002, the Chapter was amended, in part, to change the criteria for the application of "extraordinary circumstances" related to categorical exclusions. 67 Fed. Reg. 54622 (August 23, 2002). The latest revision to Chapter 30 occurred pursuant to a Federal Register Notice on February 15, 2007, 72 Fed. Reg. 7391. See 73 Fed. Reg. 43093 (July 24, 2008).

Not only must you consider the cumulative impacts of these 26 Projects currently being considered for approval under Category 8, but you must also consider the impacts of all projects previously approved using Category 8 which may have any cumulative impacts. Furthermore, you must review any other past, present, or reasonably foreseeable impacts in your cumulative impacts analysis for these projects, including but not limited to: road construction, timber management, minerals exploration and development, livestock management, travel management, wildfire, prescribed fire, or other activities.

Again, we appreciate the opportunity to provide these additional issues for consideration and look forward to continuing to work with the Nez Perce-Clearwater National Forests on this and other projects in the future.

Sincerely,



Jonathan Oppenheimer
Senior Conservation Associate

Attachments: Scoping notices for Silver Lode 9 (NF), Julie Shaft Lode (NF), Sweet 50 (NF), Chuckers Lode (RR), Pasadena Frank Peck Lode (RR), Newsome (RR), Gold Zone (RR), Orogrande Project 2013 (RR), Heritage 2 Placer (RR), Baldy Creek Placer (RR), Heritage Gulch Placer (RR), Lost Bench Placer (RR), Pioneer Placer (RR), Lower and East Sand Creek Placer (SR), Steamboat Placer (SR), Rex Placer (SR), Pioneer Gulch/Summit Placer (SR), Max 2 Placer (SR), Shadow Creek (SR), Old Shoe Lode (SR), New Red Lead Adit (NF), Chetwood Lode (L), Gold Zone Drilling (RR), Pioneer Placer (RR), Jule Mine Exploration Drilling (NF), Max #2 Placer (SR) Exploration Projects.